No. 983

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALASKA FISH AND LUMBER COMPANY,
Plaintiff in Error,

vs.

EDWARD A. CHASE,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

W. E. CREWS,
Attorney for Plaintiff in Error.

LORENZO S. B. SAWYER,
of Counsel.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

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Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is a writ of error to a judgment in favor of defendant in error, plaintiff in the court below, in an action on a contract of employment by plaintiff in error, defendant in the court below, in its fishing and cannery business in Shakan, Alaska, for one year from March 1, 1902, for a consideration of $200 per month, board and lodging and expenses in traveling to and from Seattle, Washington, and Alaska.

The following is a copy of the complaint:

"*In the United States District Court, in and for the District of Alaska, Division No. 1, at Juneau.*

EDWARD A. CHASE,
Plaintiff,

vs.

ALASKA FISH AND LUMBER COMPANY,
Defendant.

Complaint.

Now comes the above-named plaintiff, and for cause of action against the above-named defendant alleges:

1.

That defendant is a corporation duly incorporated under the laws of the territory of Arizona, but doing business and having property within the District of Alaska, Division No. 1.

2.

That plaintiff is now, and has been for many years a fisherman, engaged in the business of superintending the taking, canning, and otherwise preparing for the market, salmon and other fish in large quantities; and such business is his calling and vocation in life.

3.

That, heretofore, to wit, on the 14th day of February, 1902, the plaintiff and defendant made and entered into a contract and agreement wherein and whereby the

defendant employed the plaintiff for the period of one year, beginning March 1, 1902, as superintendent, or foreman, for defendant in its fishing and canning business, at an agreed and stipulated consideration to be paid by defendant, of $200 per month, board and lodging for the said year, and expenses in traveling to and from Seattle, Washington, to Alaska. A copy of said contract is hereto attached, marked Exhibit "A" and made a part hereof.

4.

That immediately after the execution of said contract, the plaintiff pursuant to said contract, and the directions of the defendant, came to Shakan, Alaska, and took charge as superintendent of the defendant's salmon canning establishment at that place. That thereafter plaintiff faithfully performed all the duties required of him as such superintendent, and fully performed his part of said contract until the 24th day of June, 1902; and was then and has ever since been ready, willing and able to perform his said duties as such superintendent under and pursuant to said contract.

5.

That on the said 24th day of June, 1902, defendant, without cause and in violation of said contract, discharged plaintiff from his employment, and refused to permit him to perform further said contract.

6.

That the said business mentioned above is of such a nature that it is customary and necessary to secure employment therein by the year or for the whole sea-

son of fishing and canning, and plaintiff, although he has endeavored so to do, has not been able, and will not be able, prior to the beginning of the next season of fishing, to wit, about March 1, 1903, to secure any employment and will, during the whole period from June 24, 1902, to March 1, 1903, be left without employment and compelled to support himself at his own expense.

7.

That defendant has only paid plaintiff the sum of $766.66 on his wages due, and to become due under said contract, and refuses to pay plaintiff's expenses to Seattle, or to pay his board and lodging from and after said 24th day of June, 1902; that, by reason of the breach of contract by defendant as aforesaid, plaintiff has been damaged in the following sums, to wit:

For loss of wages	$1,633.33
Expenses for board and lodging	410.00
Expenses return trip to Seattle	25.00
Making an aggregate of	2,068.33

Wherefore, plaintiff prays judgment against defendant for the sum of two thousand sixty-eight and 33-100 ($2,068.33), together with costs herein incurred.

MALONY & COBB,
Attorneys for Plaintiff."

(Record, 1-3.)

The following is a copy of the contract declared on in this action:

"This agreement made this 14th day of February, 1902, by and between the Alaska Fish and Lumber Company, a corporation, incorporated under the laws of the Territory of Arizona, party of the first part, and Edward A. Chase, of Seattle, Washington, party of the second part, witnesseth: That said party of the second part agrees with said party of the first part to work for said party of the first part as a superintendent or foreman, or in such other capacity as both parties hereto consent to, for the term of one year, beginning March 1, 1902, in the Territory of Alaska, or elsewhere in the United States, as said party of the first part shall desire, and to well and faithfully devote his entire time, efforts and attention during said year to the services of the said party of the first part. And in consideration thereof, said party of the first part agrees with said party of the second part, that, so long as he shall faithfully perform his duties in the services of the party of the first part hereunder, said party of the first part will bear and pay*ing* his traveling expenses from Seattle, State of Washington, to Alaska, and return, providing the party of the second part remains in the services of the party of the first part for the term of one year as hereinafter stated, and also pay, or furnish free to the party of the second part, board and lodging, and will further pay the party of the second part the sum of $200 per month, payable monthly, and within thirty days after the end of each month.

It is understood and agreed that the party of the second part shall give his time from date until the first

of March, 1902, to the party of the first part, without further consideration.

In witness whereof, said parties have executed this agreement the day and year aforesaid.

ALASKA FISH AND LUMBER COMPANY,

By ————————."

(Record, 50, 51.)

A demurrer was interposed to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, which having been overruled an answer was filed, and the case was tried by a jury, which found a verdict for plaintiff, and assessed his damages at the sum of $1,773.00. Whereupon, after denying a motion made by defendant for a continuance and another for a new trial, the Court gave judgment for said sum, with interest and costs. (Record, 4-8, 11-13, 16-30, 31, 32.)

Defendant filed its assignment of errors and prayer for reversal, and the case is now here for review and correction upon a writ of error duly sued out and allowed.

SPECIFICATIONS OF ERRORS.

The assignment of errors is, in substance, as follows:

1.

The Court erred in overruling defendant's demurrer to plaintiff's complaint, for the reason that the said complaint does not state facts sufficient to constitute a cause of action, in this: The said plaintiff in his said complaint declares upon his contract for hire and seeks to enforce the said contract as for constructive wages. And for the further reason, that the said contract upon

its face shows that the defendant had the right, under said contract, to discharge the plaintiff at any time he proved to be unsatisfactory.

2.

The Court erred in its instructions to the jury wherein he instructed the said jury, "That the true rule as to the measure of damages, if plaintiff is entitled to recover at all under the evidence, and these instructions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages."

3.

The Court erred in refusing and denying the defendant's motion for a new trial; and in ordering judgment to be entered for the plaintiff.

And for errors assigned, and other manifest errors appearing in the record, the defendant, the Alaska Fish and Lumber Company, prays that the judgment of the lower court be reversed, and that this cause be remanded with instructions to grant a new trial.

ALASKA FISH AND LUMBER CO.,

Per W. E. CREWS,

Its Attorney.

ARGUMENT.

1.

Upon our first assignment and specification of error, we cannot do better than quote the court below in its "Decision on Motion for a New Trial." (Record 16-30.)

This "is equivalent to a general demurrer to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action in support of this ground of the motion" (and objection to the complaint's validity, as also to the jurisdiction of the court, can be raised at any stage of the case. See Cal. Code Civ. Proc., sec. 434, and cases cited in note). "Counsel for defendant argued with great vigor and earnestness that the complaint is a claim for labor and services, and not for damage for breach of contract, and cites James vs. Allen County, 44 Ohio St. 226. S. C. 58 Am. Rep. 821. This case holds in effect that 'Where a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover for future installments, but only for breach of contract.' * * * The doctrine of constructive service for which suit could be brought lawfully, as it is claimed, at one time in England and in some of the states of the United States, seems to have been overturned as the law of England and mainly so in the states of the Union. It is said in Moody v. Leverich, 4 Daly (N. Y.), 401, that a servant wrongfully dismissed cannot wait until the expiration of the period and sue for his whole wages on the ground of constructive service, his only remedy being an action on the contract for hire. (Howard vs. Daly, 61 N. Y. 362, S. C. 19 Am. Rep. 285.) It would seem that Alabama, Mississippi, Missouri, and Wisconsin" (we add, Arkansas, Colorado, Georgia, Illinois, Indiana, Kentucky, Maine, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Vermont and Virginia), "disapprove the doctrine of constructive service. Without

further consideration of this question, it is deemed sufficient to say that the great weight of authority now is, that suit for constructive services under such conditions as are presented in the case at bar, *cannot be maintained.* (Chamberlain vs. Morgan, 68 Pa. St. 168; Willoughby vs. Thomas, 24 Gratt. (Va.) 522; Chamberlin vs. McCallister, 6 Dana (Ky.), 352; Whitaker vs. Sandifer, 1 Duvall (Ky.), 261; Miller vs. Goddard, 34 Me. 102; S. C. 56 Am. Dec. 638." (Record, 21-23.)

A servant discharged before the expiration of his term of service cannot recover on the *theory of constructive service,* but must claim damages for his discharge, This rule of law is thoroughly discussed in the American and English Encyclopedia of Law in both the first and the second editions, under the head of "Master and Servant," and especially in the first volume of the second edition of that work on page 1104, under the head of "Agency"; and many adjudicated cases, both English, state and federal, are cited. The rule laid down there is as follows: An agent or servant wrongfully discharged has but two remedies growing out of the wrongful act: First, he may rescind the contract, in which case he may sue immediately on a *quantum meruit* for services actually rendered; or, Secondly, he may treat the contract of employment as continuing, though broken by the principal, and may recover damages for the breach.

To save the Court the trouble of consulting this dictionary of law, we quote the authorities cited in it:

Under quantum meruit—Britt vs. Hays, 21 Ga. 157; Rogers vs. Parham, 8 Ga. 190; Howard vs. Daly, 61 N.

Y. 362, 19 Am. Rep. 285; Brinkley vs. Swingood, 65 N. C. 625; Pooge vs. Pac. N. Co., 33 Mo. 215, 82 Am. Dec. 160; Derby vs. Johnson, 21 Vt. 17; Moody vs. Leverich, 4 Daly (N. Y.), 401.

Under damages for breach of contract—England: Goodman vs. Pocock, 15 Q. B. 576, 69 E. C. L. 576.

Alabama: Strauss vs. Meertief, 64 Ala. 299, 38 Am. Rep. 8.

Arkansas: Gardenhire vs. Smith, 39 Ark. 280.

Colorado: Saxonia Min. etc. Co. vs. Cook, 7 Colo. 569.

Georgia: Britt vs. Hays, 21 Ga. 157; Rogers vs. Parham, 8 Ga. 190.

Illinois: Williams vs. Chi. Coal Co., 60 Ill. 149.

Indiana: Richardson vs. Eagle Mach. Works, 78 Ind. 422, S. C., 41 Am. Rep. 584.

Kentucky: Chamberlin vs. McCallister, 6 Dana (Ky.), 352.

Maine: Miller vs. Goddard, 34 Me. 102; S. C., 56 Am. Dec. 638.

Minnesota: Horn vs. W. La. Assn., 22 Minn. 233.

Missouri: Pooge vs. Vincent, 7 Mo. App. 277; Ream vs. Watkins, 27 Mo. 516, 72 Am. Dec. 283; Lewis vs. Atlas Mut. L. Ins. Co., 61 Mo. 534.

New York: Howard vs. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Moody vs. Leverich, 4 Daly (N. Y.), 401.

North Carolina: Brinkley vs. Swingood, 65 N. C. 626; Hendrickson vs. Anderson, 5 Jones (N. C.), 246.

Ohio: James vs. Allen Co., 44 Ohio St. 226, 58 Am. Rep. 821.

Vermont: Derby vs. Johnson, 21 Vt. 17.

Virginia: Willoughby vs. Thomas, 24 Gratt. (Va.) 521.

Under the rule applicable in the case at bar, Chase, plaintiff, could only recover damages for the breach of his contract. The Court will see, however, from the record, that he did not proceed upon that theory, but attempted to recover as for constructive wages earned. In the 7th paragraph of his complaint, he states that he has only received $766.66 on his wages *due and to become due* under said contract, and in the same paragraph "for loss of wages, $1,633.33." And in his testimony on page 50 of the record, he was asked: "Have they paid you any salary since the 23d day of June?" To which he answered: "No." In the instruction complained of on page 57 of the record, the Court instructs the jury that the true rule as to the measure of damages is the amount *due on the contract.* Therefore, the complaint, proof, and the instructions of the Court all go to show that this action was brought and tried upon the theory of constructive wages. And the cases all hold that a party cannot, in an appellate court, change the theory on which his case was tried in the lower court, any more than he can change his cause of action or his defense. And it is no part of the duty of a Court or judge, to "read between the lines" of a pleading to make it "firm and good." He who tries to ride two horses at once, or sit on two stools, generally falls off between them. Besides, plaintiff admits having been paid in full for his services *actually rendered*, and the contract upon its face shows that the defendant had the right, under said contract, to discharge plaintiff at any

time he proved unsatisfactory. (See contract, supra.) It is the duty of the trial court to construe any contract declared upon, and of the appellate court to set the lower court and its jury right, if they have "gone wrong."

2.

The second error asserted and urged relates to the court's instruction to the jury, "That the true rule as to the measure of damages, if plaintiff is entitled to recover at all, under the evidence, and these instructions, would be the amount due on the contract from the first day of March up to the present time, less the amount that has been paid. That is the true rule as to the measure of damages."

The error in this instruction is that the amount due on the contract *is not the true rule.* The true rule in this case is the amount of the contract less what the plaintiff might have earned by the exercise of due diligence in securing other employment of a similar nature.

"The principle which measures damages" (for breach of contract) "at common law, is that of giving compensation for the injury sustained. * * * But in some instances, the law lessens this compensation, leaving upon the injured party a part of his loss; and in others, increases the compensation, by way of punishment to the wrongdoer." (3 Par. Con., 5th ed., 155.)

There is no question nor claim for exemplary damages here. Our California Civil Code, which is supposed to crystallize the common law, provides in sections 3300 and 3301 as follows:

"Sec. 3300. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

"Sec. 3301. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (See F. & T. L. Co. vs. Miller, 67 Cal. 464, 467.) The complaint in this case may be true and yet the plaintiff have been much benefited by the dismissal. Was not the instruction clearly misleading? The verdict shows that the jury simply calculated the amount and based its verdict upon the contract as for wages earned.

3.

The Court erred in denying the defendant's motion for a continuance and afterward for a new trial. The motion for a continuance was not specially assigned for error.

The motion for a continuance and the motion for a new trial were, of course, addressed to the discretion of the trial court, and it is well settled that matters of discretion or practice cannot, generally speaking, be made the basis of an appeal or writ of error, unless this discretion was abused. The only record we have here of these two motions is found in the "Decision of the Court on Motion for a New Trial" (Record, 16-30.); "but

the Court, at its option, may notice a plain error not assigned."

If this Court is of opinion that this case ought to have been continued, or a new trial granted, to enable defendant to prove incompetency, unfitness and habitual intoxication on the part of the plaintiff (Record, 26, 27), it will, to the end that injustice may not be done, reverse the judgment herein and send the case back for a new trial. *Ld. v. Rio Grande Dam & Irr. Co. et al. 184 U.S.*

Respectfully submitted,

W. E. CREWS,

Attorney for Plaintiff in Error.

LORENZO S. B. SAWYER,

Of Counsel.